

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

IRENE OLIVAS

Claimant

VS.

EXCEL CORPORATION

Respondent

Self-Insured

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Docket No. 172,488

ORDER

Claimant requests review of the Award of Administrative Law Judge Thomas F. Richardson entered in this proceeding on November 18, 1994. The Appeals Board heard oral argument on August 2, 1995.

APPEARANCES

Claimant appeared by her attorney, Chris A. Clements of Wichita, Kansas. The respondent, a qualified self-insured, appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge. Although the transcript of deposition of John Lindal is shown as evidence in the Award of the Administrative Law Judge, it was not considered by the Appeals Board because it pertains to a different claimant and has no relevance to the issues now before us.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a seven percent (7%) functional impairment rating. Claimant requested the Appeals Board to review that finding and contends she has sustained significant work disability. Nature and extent of disability is the sole issue now before this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the finding of the Administrative Law Judge that claimant is entitled to receive permanent partial disability benefits based upon a seven percent (7%) functional impairment rating to the body as a whole should be affirmed.

The parties stipulated claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent during the period of November 1992 through October 12, 1993. Respondent operates a meat packing plant and claimant worked in the job of "staging top butts". This job required claimant to repetitively hook and move pieces of meat weighing twenty to thirty (20-30) pounds from one conveyor belt to another. As a result of this work, claimant developed pain in her right shoulder and arm. Later, claimant's complaints spread to other parts of her body. The parties stipulated claimant has sustained a seven percent (7%) functional impairment to the body as a whole as a result of her work-related injury.

Respondent terminated claimant from employment on October 12, 1993. The circumstances surrounding the termination are disputed. Respondent contends claimant refused to perform her regular job of staging top butts. Claimant contends she did not refuse to work, but advised respondent she could not work her regular job at that particular time because she had to attend a court hearing. Respondent denies being advised that claimant had to attend court.

Several physicians testified on behalf of the parties. At her attorney's request, claimant was examined on November 15, 1993, by Ernest R. Schlachter, M.D., who testified claimant had symptom magnification but little else wrong with her. Claimant's treating physician, orthopedic surgeon C. Reiff Brown, M.D., testified he treated claimant from February through September 1993 and that claimant had sustained a three percent (3%) functional impairment to the body as a whole as a result of her work-related injuries. Dr. Brown's impairment of function rating is based upon the tendinitis of the shoulders he felt claimant had when he first saw her in February 1993. He also felt claimant might possibly have had some early signs of myofascial pain syndrome when he released her in September 1993. Dr. Brown believes claimant should avoid repeated use of the hands above shoulder level; only occasionally lift more than ten (10) pounds above her shoulder; avoid lifting more than fifty (50) pounds; and avoid pushing or pulling more than fifty (50) pounds at waist level. Dr. Brown testified claimant's symptoms became extremely bizarre during the period of treatment. He ultimately released claimant to return to work and, after viewing a video tape of claimant's job, believes that she can perform the job of staging top butts without violating her permanent restrictions.

The third physician to testify was physiatrist Lawrence Blaty, M.D., who believes claimant has myofascitis involving the cervical and shoulder complex, chronic lower back strain and a patellofemoral knee condition which constitute a seven percent (7%) functional

impairment to the body for the shoulders and cervical involvement, and a four percent (4%) functional impairment to the body for the lower back. This doctor feels claimant should be restricted to light-medium labor with no lifting greater than forty (40) pounds occasionally or overhead lifts more than four (4) pounds. Additionally, claimant should limit squat lifts to no greater than twenty-five (25) pounds occasionally and limit overhead reaching, pushing and pulling. The doctor also believes claimant should perform no repetitive work with outstretched arm, limit her bending and squatting, and alternate every hour and one-half between standing and non-weight bearing activities. Dr. Blaty did not believe claimant was exaggerating her symptomatology.

The Administrative Law Judge found claimant's benefits should be computed based upon an accident date of November 30, 1992. Because neither party requested that finding to be reviewed, the Appeals Board will also utilize that date of accident to determine claimant's benefits.

Because hers is a "non-scheduled injury", claimant is entitled to permanent partial general disability benefits under the provisions of K.S.A. 1992 Supp. 44-510e. The statute provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds the opinions of Dr. Brown are the most persuasive of the physicians who testified and that claimant retains the ability to perform her former job of staging top butts. The Appeals Board also finds the claimant was terminated by respondent when she refused to work after being advised of her reassignment to her former job. The Appeals Board is unconvinced that claimant advised respondent she had a court appearance to attend and, therefore, would be unable to resume her former job duties. Because claimant retains the physical ability to return to her former job and earn a comparable wage, the presumption of no work disability in K.S.A. 1992 Supp. 44-510e is applicable and has not been overcome. The Appeals Board has reviewed the testimony of claimant's labor market expert, Jerry D. Hardin, regarding work disability and finds that testimony does not overcome the presumption of no work liability under the facts of this case. The finding of the Administrative Law Judge that claimant is entitled permanent partial disability benefits based upon a seven percent (7%) functional impairment rating to the body should be affirmed, although the computation section of the Award should be modified to correct a typographical error concerning the date of accident.

The findings and conclusions of the Administrative Law Judge set forth in the Award of November 18, 1994, are hereby adopted by the Appeals Board to the extent they are not inconsistent with the specific findings and conclusions set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, dated November 18, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Irene Olivas, and against the respondent, Excel Corporation, a qualified self-insured, for an accidental injury occurring on November 30, 1992 for 415 weeks at the rate of \$19.96 per week or \$8,283.40 for a 7% permanent partial general disability.

As of August 31, 1995, there is due and owing claimant 143.43 weeks of permanent partial disability compensation at the rate of \$19.96 per week in the sum of \$2,862.86, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$5,420.54 is to be paid for 271.57 weeks at the rate of \$19.96 per week, until fully paid or further order of the Director.

Claimant's contract of employment with her attorney is approved subject to the provisions of K.S.A. 1992 Supp. 44-536.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent to be paid directly as follows:

Underwood & Shane	
Deposition of Irene Olivas	\$360.00
Underwood & Shane	
Deposition of Susan Stephens	\$184.25
Underwood & Shane	
Deposition of John Lindal	\$320.75
Underwood & Shane	
Deposition of Dr. Brown	\$236.25
Barber & Associates	
Deposition of Jerry Hardin	\$302.20
Barber & Associates	
Deposition of Dr. Blaty	\$305.00
Ireland Court Reporting	
Deposition of Dr. Schlachter	\$164.40

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, Kansas
D. Shane Bangerter, Dodge City, Kansas
Thomas F. Richardson, Administrative Law Judge
Philip S. Harness, Director